Supreme Court, U.S.
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No. 97-247

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF PLACER,

Petitioner,

vs.

YOVANA GUTOWSKY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is a *Monell*[1] action which attacks the policies of a public employer under 42 U.S.C. Section 1983 timely when brought within one year of the employee's separation of employment where the challenged policy was in place at the time of separation and the employee was injured by it?

2. Is the continuing violations doctrine an appropriate vehicle to analyze a Section 1983 claim alleging a discriminatory employment policy?

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[1] Referencing, *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

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STATEMENT OF THE CASE

The following evidentiary facts are relevant:

Gutowsky was first employed for the County of Placer, Department of Public Works Road Division in March 1982. (E.R. pp. 42:23-25; 149:21-27). Gutowsky remained employed in the position of communications clerk for approximately ten years. Although Gutowsky's responsibilities increased, she never was promoted. (E.R. pp. 172:15-19; 173:1-3).

Gutowsky's last day at her job was May 26, 1993. On this day Gutowsky was taken to a psychologist and subsequently placed on medical leave. She never returned. (E.R. pp. 58:5-28; 127-128).

Gutowsky appealed the district court's grant of summary judgment in favor of petitioner with respect to her claim that she did not promote on account of the County's discriminatory policies which persisted at least until she last worked. In this latter connection, Gutowsky's complaint specifically pleaded a broad attack on the County's hiring and promotion policies regarding women. (App. C to Petition, p. 8a, note 1; E.R. pp. 15-17).

From the time she first became a full-time employee in 1983 it was Gutowsky's goal to promote. To do so in her department she needed experience operating the road equipment to obtain a commercial driver's license. (E.R. pp. 159-160; 179:1-182:7; 234:7-17).

According to the County, Gutowsky's "performance evaluations were favorable and her supervisor commented on the quality of her work in a stressful job dealing with the public." (E.R. pp. 57:17-20; 117:7-13).

Gutowsky was never disciplined for misconduct in the workplace. (E.R. pp. 117:14-19). Gutowsky's supervisor could not recall any inappropriate behavior on Gutowsky's part on the job. (E.R. 117:20-25). In addition, Gutowsky holds a four year college degree which she completed prior to the time she became a full-time employee for the County. (E.R. pp. 154:25-28; 167:25-168:1).

Gutowsky asked her first supervisor, Leonard Zick, if she could practice on County equipment for a commercial driver's license in 1983. Zick told Gutowsky that she "could not do it because it was not County policy." (E.R. pp. 159:4-8; 178:16-26). In 1985 Gutowsky also asked Jack Warren, the Assistant Director of Public Works, if she could use equipment for a commercial driver's license test. In 1983 Gutowsky also asked John McGowan, the Director of Public Works, if she could use County equipment to practice for her commercial license. Gutowsky also spoke with Assistant Director Jan Witter about obtaining a Class I license and he "laughed." (E.R. pp. 159:12-23; 179:25-182:11). Unlike Gutowsky, male road crew members were allowed to use County equipment to practice for commercial licenses. (E.R. pp. 159:15-20; 234:14-17; 231:17-23).

During 1991 Gutowsky again asked Witter if she could use County equipment to obtain a commercial license. Witter laughed and did not answer Gutowsky's question. (E.R. pp. 159:23-27; 181:26-182:11). Gutowsky also asked her supervisor, Ken Compton, if she could utilize County equipment for this purpose. When Gutowsky asked Compton if she could use County equipment to practice for a Class I test, Compton said that

Gutowsky was "a mere woman." Gutowsky nonetheless asked Compton at least once a year during her review time if she could practice on County equipment to obtain a Class I license. (E.R. pp. 160:1-8; 183:14-22).

Gutowsky actually took and passed the written test for a Class I commercial driver's license in 1990 or 1991. Gutowsky told Compton that she had passed the written test for the commercial license. (E.R. pp. 160:9-13; 183:23-184:12).

Gutowsky persisted in her attempts to promote and become an equipment operator on at least six occasions during the time that Peter Caravella was her supervisor from 1992 through May of 1993. Caravella thought this was a good idea. However, any attempts Caravella made to give Gutowsky field training necessary for promotion were met with reprimands from Witter and Compton. Compton and Caravella discussed this specific matter as late as May 1993. (E.R. pp. 160:16-28; 207:10-27).

Jim Gray, the Personnel Director for the County, is not aware of any women being hired as full-time road maintenance workers. Gray testified that "[m]y perception is that women have not applied for these jobs. There may have been a woman or two women or three women that have applied, but I'm telling you . . . they have not applied." When asked what his perception was based on, Gray replied: "Because of my capacity as personnel director and generally knowing what's going on and generally knowing the . . . applicants." (E.R. pp. 223:24-225:5; 226:7-19).

In stark contrast to Gray's testimony, from 1992 through May 1993 alone, the County of Placer received 67

written applications from women seeking positions with the County which requested the classification of road maintenance worker. (E.R. pp. 240-378). No woman has ever been hired full-time either as a road maintenance worker or as an equipment operator. (E.R. p. 231:17-23).

Gutowsky filed this action on May 24, 1994, within one year of her last day at work, May 26, 1993. (E.R. p. 1). The district court granted the County's motion for summary judgment on statute of limitations grounds without reaching its other arguments. (E.R. pp. 466:23-25; 470:12-18). The County asserted that Gutowsky's claim accrued one year after "the last equipment operator eligibility list for the Department of Public Works, Tahoe, was certified." (E.R. p. 62:3-12). The district court disagreed with the County's chosen accrual date finding that Gutowsky's claim accrued one year after her former supervisor, Compton, made a discriminatory remark. (E.R. pp. 469-470). Nor did the district court comment at all on the scores of applications submitted by women for the sought position. Gutowsky submitted these applications, received by the County through May of 1993, as evidence in support of her claim. (E.R. pp. 465-471).

Gutowsky asserted both to the district court and to the court of appeals that since she was continuously injured by an existing policy of discrimination which was in place when she last worked, her separation date is the date on which her claim accrued. (E.R. p. 466:4-22; *and see,* Brief of Appellant, pp. 11-12, "[U]nless the statute of limitations started running for Gutowsky when she last worked for the County, the accrual of her claim cannot be pinpointed . . . [the standard] rule does not state when an employee should know a policy is discriminatory or

when an adverse employment decision is motivated by policy.") The Ninth Circuit agreed with Gutowsky. (App. C to Petition, p. 12a).

ARGUMENT

A. There Is No Disagreement Among the Circuits Regarding The Timeliness of Gutowsky's Policy Claim

Sixty-seven women applied and not one was hired. This is not a case alleging a discrete *act* of discrimination, but a challenge to a widespread *policy* of discrimination of which Gutowsky was a victim.

The County argues that "[t]here is great deal [sic] of disparity . . . among the circuits", and cites largely inapposite cases as examples of "[c]ircuits . . . basically concluding that § 1983 actions accrue when a plaintiff should be aware of the injury and its connection to the acts of the defendants . . . " Citing, *Association Against Discrimination and Employment, Inc. v. City of Bridgeport,* 647 F.2d 256, 274 (2d Cir. 1981), *cert. denied,* 455 U.S. 988 (1982); *Acha v. Beame,* 570 F.2d 57, 65 (2d Cir. 1978) and *Lavellee v. Listi,* 611 F.2d 1129, 1131 (5th Cir. 1980). (Petition, p. 7).

Gutowsky does not quarrel with the County's recitation of the federal standard on claim accrual. The County fails to explain, however, *when* this date accrues in a case like Gutowsky's where an unconstitutional policy persists. Nor does the County consider that its argument would permit it to continue to implement a discriminatory policy indefinitely.

In *City of Bridgeport*, a Title VII case, the Second Circuit opined that:

> Where . . . the defendant has engaged in a continuous policy of discrimination, acts in furtherance of that policy are not viewed in isolation. In such circumstances if the charge has been filed no later than 300 days, after the *last* act by the defendant pursuant to its policy, the plaintiff may recover for earlier acts of discrimination as well. [Citation].

City of Bridgeport, supra, 647 F.2d at 274 (emphasis original). Quoting petitioner's other authority of choice, *Acha v. Beame*, the court explained this principle as follows:

> To succeed at trial, the appellants must be able to demonstrate a Title VII violation occurring after the effective date of the Act and within the period of the statute of limitations . . . But such a violation is not limited to hiring violations *per se*.
>
> A continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the *last occurrence* of an instance of that policy . . . Furthermore, where an illegal policy is so maintained, relief for injuries sustained even before the beginning of the limitations period is appropriate.

Id., quoting, *Acha v. Beame, supra*, 570 F.2d at 65.

Although the facts of these cases by no means resemble hers, even under this analysis Gutowsky's claim is timely. Her record is undisputed that through May 1993 the County had received scores of applications from women seeking equipment operating positions, and the

County persisted in refusing to hire even one of them. (E.R. pp. 231:17-23; 240-378).

Lavellee gets closer to the issue, but to no avail to the County. In this Section 1983 medical malpractice action, the Fifth Circuit acknowledged that it "can be exceedingly difficult to apply" the federal standard regarding claim accrual to constitutional torts. Exploring this issue further the court rejected the very proposition asserted by petitioner here: that such a claim accrues at the "moment of injury." 611 F.2d at 1131.[2]

Although the opinion limits itself to the analysis of a medical malpractice claim (no existing *policy* was challenged by the plaintiff), it cites this Court's decision in *United States v. Kubrick*, 444 U.S. 111 (1979):

> [T]he Supreme Court has rejected the standard which would allow the statute of limitations to commence running before the plaintiff was or should have been aware of the causal connection between his injury and the acts of the defendants. Until the plaintiff is in possession of the "critical facts that he has been hurt and who has inflicted the injury," *id.*, the statute of limitations does not commence to run.

Lavellee v. Listi, 611 F.2d at 1131, quoting, *Kubrick*, 444 U.S. at 121.

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[2] The County over-simplifies what is and should remain a careful constitutional analysis when it asserts that, "[i]t is not difficult at all to ascertain exactly when a claim accrues under a § 1983 *Monell* action for it is simply the date on which a discriminatory act took place." (Petition, p. 9).

The Fifth Circuit determined that it did not have sufficient facts to apply this standard – no evidence was presented by the defendant that the plaintiff should have known of the facts giving rise to a legal claim sooner. *Id.*, 611 F.2d at 1131-1132. So is the case here. The County offered no evidence to indicate that Gutowsky should have been aware that scores of women had applied for the sought positions to no avail, or that her failure to promote and train was the product of an unconstitutional policy promulgated by her employer.

Moreover, Gutowsky's record is virtually undisputed that this policy was alive and well when she last worked. Unlike an unnecessary spinal tap, a policy excluding women from sought positions is even more difficult to identify as a violation by a particular plaintiff who has no access to critical evidence notwithstanding her own injury in fact.

Better defining the contours of the particular constitutional tort here is the court of appeals below. The court relied on factually apposite case authority and explained its reasoning as follows:

> In *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980), we reversed a district court decision in a case in which plaintiff alleged a policy of continuing discriminatory practices. In *Reed*, the district court found that plaintiff had alleged only three instances of discrimination, and held that her claim was time-barred because it had not been filed within the appropriate time period from the date of the last discriminatory instance. On appeal we held that:

> The complaint should not be read so narrowly. Her allegations included a sweeping attack on Lockheed's systems of promotion, compensation, and training. She alleged the violations took place throughout her service at Lockheed and until the day she filed her complaint. . . .
>
> Like the *Reed* plaintiff, Gutowsky presents specific examples of discrimination which "are not the basis of her charge of discrimination but rather are but evidence that a *policy* of discrimination pervaded [her employer's] personnel decisions." [Citation]. Indeed, Gutowsky contends that the widespread policy and practices of discrimination of which she complains continued every day of her employment, including days that fall within the limitation period.

Gutowsky v. County of Placer, 108 F.3d 256, 260 (9th Cir. 1997), quoting, *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 759-760 (9th Cir. 1980).

There is no great divide among the circuits regarding the timeliness of such claims, only fact specific analyses in diverse cases wherein the circuit courts grapple with the inherent difficulties of applying nineteenth century constitutional law to violations in contemporary society. The County repeatedly relies on authority, such as *Chardon v. Fernandez,* 454 U.S. 6 (1981) (Petition, pp. 3, 4, 5, 6), that does not deal with policy claims at all, but with discrete acts of discrimination, such as a single firing or demotion.

By its petition the County urges this Court to disregard the most insidious discrimination in public employment. By its analysis, a "White's Only" sign on the hiring

door would be permissible if not challenged within a year of the last black employee unfortunate enough to see it.[3] No case cited by the County supports such a restrictive view.

B. The Application Of The Continuing Violations Doctrine To Gutowsky's Section 1983 Claim Is A Logical Extension Of Existing Law Consistent With The Treatment Of Title VII Claims

In *Gutowsky*, the court held that the continuing violations doctrine would apply to her case. 108 F.3d at 259 (App. C to Petition, pp. 12a-13a). *Gutowsky* expressly finds the doctrine applicable to constitutional torts alleged by public employees. *Id.* Although the Ninth Circuit had not so explicitly held prior to this time, it had long analyzed Section 1983 claims, as has at least one

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[3] This Court explained this point well in *International Bro'hood of Teamsters v. United States*, 431 U.S. 324, 365 (1977):

> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices – by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, by his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.

other circuit, in the context of the continuing violations doctrine.

In *Green v. Los Angeles County Superintendent of Schs.*, 883 F.2d 1472 (9th Cir. 1989), for example, the court analyzed the plaintiff's Section 1983 claim under the doctrine, finding the facts of that case did not support its application as the incidents claimed by the plaintiff were not like and reasonably related and therefore not part of a "continuing pattern of discriminatory conduct." 883 F.2d at 1480.

In *Green*, the court presumed without comment that the doctrine might apply to the plaintiff's Section 1983 claims relying on settled Title VII law on point. *Id. Gutowsky* expressly acknowledges the propriety of such an analysis. 108 F.3d at 259.

This is not to say that Gutowsky's claims survive only by virtue of this common law doctrine. Her claim was timely nonetheless since her record showed that the challenged policy was both in place, and that she was subjected to it, within the limitations period. *See, e.g., Gutowsky*, 108 F.3d at 260 ("The County's theory ignores the portions of Gutowsky's claim of explicit experiences of discrimination that show these [instances] to be a *continuing pattern of discriminatory action in its promotion and placement procedures;* and that these practices and procedures were in place during the entire period of Gutowsky's employment." Emphasis added.) Gutowsky was injured by the County's policy every day she was subjected to it. In Gutowsky's case, the continuing violations doctrine does not salvage her claim, it merely defines its scope.

Again, the very authority relied on by the petitioner supports the doctrine's application to Section 1983 claims. As the Tenth Circuit notes in *Pike v. City of Mission*, 731 F.2d 655 (10th Cir. 1984), cited at page 8 of the petition:

> A continuing violation generally arises in the context of unconstitutional employment discrimination. It is usually based on a showing that an employer continues to implement an illegal system or policy, such as race discrimination, that came into being prior to the limitations period. . . . A suit challenging a systematic policy is not barred even though the policy began before the limitations period, because the policy itself continues to violate employees' rights. [Citations].

731 F.2d at 660.

Neither the courts in *Green* nor *Pike* expressly considered the potential applicability of the doctrine of continuing violations to Section 1983 actions. Both of these courts, however, naturally deferred to the doctrine as an appropriate analysis for the Section 1983 claims before them. Perhaps because the structured analysis of the doctrine lends itself well to the analysis of constitutional torts, these courts presumed the doctrine's application. As the Ninth Circuit notes in *Gutowsky*, "[t]he County suggests no cogent reason why this should not be the case." 108 F.3d at 259.

Gutowsky can think of good reasons why the opposite is true. First, civil servants should not be compelled to file a federal lawsuit at the first "moment" of perceived injury where an unconstitutional policy is at issue. Like all large employers, local government should be afforded

an opportunity to "clean its own house." Under the County's analysis those victimized by persisting illegal policies would be obliged to file multiple suits to right what is essentially the same wrong, and they would have to do so at the first suspicion of unlawful conduct subjecting them to injury. As is often the case with employment discrimination, these "first instances" may well be trivial and insufficient to state a constitutional tort.

A *Monell* plaintiff is obliged to demonstrate that the injury complained of is the product of a widespread policy or custom, and not merely an isolated incident or she does not state a claim. As this Court noted in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), an injury in isolation will not trigger liability under *Monell*. An injury must generally have been caused by an existing unconstitutional policy attributable to a municipal policymaker. "[T]he word 'policy' generally implies a course of action consciously chosen from among various alternatives . . . unless evidence be adduced which proves that the inadequacies resulted from conscious choice . . . " a plaintiff does not state a viable *Monell* claim. *Tuttle*, 471 U.S. at 823. Requiring employment plaintiffs to rush to federal court at the first hint of injury might therefore encourage legally insufficient claims and multiple suits.

Second, under the standard federal analysis of claim accrual there is a sort of continuing violations doctrine already – a claim does not accrue until the facts supporting it, in this case confidential applications, are possessed by the plaintiff. The continuing violations doctrine is no more radical a notion than this. The doctrine merely acknowledges the difficulty in pinpointing the accrual of

discriminatory policy claims, as opposed to, say, a negligently performed spinal tap.

Third, a separation date is easily discernable by both public employers and civil servants. Such a rule gives public employers plain notice that as long as they enforce illegal policies, employees injured by them may also challenge them. Without application of the doctrine, pinpointing the accrual date of a policy claim turns murky indeed. This case is a good example. The district court determined that Gutowsky's claim accrued when her supervisor happened to make a discriminatory comment evidencing an unlawful employment practice. (E.R. pp. 466:23-25; 470:12-18). The County asserted that Gutowsky's claim accrued one year after "the last equipment operator eligibility list for the Department of Public Works, Tahoe, was certified." (E.R. p. 62:3-12). Gutowsky argued successfully that it was neither.

Finally, as noted, the structural analysis employed by the courts under the continuing violations doctrine is particularly well suited to these difficult claims. The doctrine is the product of a vast body of employment discrimination law and, as a result, one of the most effective means by which to analyze constitutional employment torts.

No circuit has held the doctrine inapplicable to Section 1983 claims per se. The Ninth Circuit was correct in expressly acknowledging the propriety of the doctrine's application to Section 1983 employment actions.

CONCLUSION

For the reasons stated, the Court is requested to deny the petition for writ of certiorari.

Respectfully submitted,

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